Supreme Court, U.S.
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No. 92-291

In The

Supreme Court of the United States

October Term, 1992

INTERNATIONAL PAPER COMPANY,

Petitioner,

v.

ALEXANDER GRASSI, SR., ET AL.,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Where a court adheres strictly to the settled federal definition of the term "civil action" under 28 U.S.C. § 1441, should it be prohibited from referring to state laws to determine whether the remedies provided therein constitute new and independent "civil actions" within the accepted federal definition?

PARTIES TO THE PROCEEDING

Ciba-Geigy PLC ("PLC") is the judgment debtor in the underlying action. Petitioner, International Paper Company ("IPC"), appellant below, is a named defendant in a turnover proceeding brought to enforce the judgment.

Respondents, appellees below, are Alexander Grassi, Sr. and Karen S. Grassi (individually and as next friends of Alexander Grassi, Jr., Wendy Lou Grassi, and Kristin Susan Grassi, minors), and IRI Internacional Limitada.

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Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

COME NOW ALEXANDER GRASSI, SR. and KAREN S. GRASSI, Individually and as Next Friends of ALEXANDER S. GRASSI, JR., WENDY LOU GRASSI, and KRISTIN SUSAN GRASSI, minors, and IRI INTERNACIONAL LIMITADA, and respectfully pray that Petitioner's request for issuance of a Writ of Certiorari herein be denied. Petitioner will be referred to throughout as "IPC"; Ciba-Geigy PLC, the judgment debtor, will be referred to as "PLC"; Respondents will be referred to as "Respondents"; Petitioner's Petition for a Writ of Certiorari will be referred to as "Petition, at p. ___" or

"Appendix ___"; and *emphasis in all quotations will be Respondents' throughout, unless otherwise indicated.*

REPLY TO THE STATEMENT OF THE CASE

A. Summary of Facts

An accurate Summary of Facts may be found in the "BACKGROUND" section of the Court of Appeals' Opinion (Appendix A), at pp. 2a through 5a. Petitioner's Summary of Facts contains the following inaccuracies, to-wit:

First, Petitioner incorrectly maintains that on three occasions the Respondents attempted to prevent "the *exercise* of the Defendant's *right* of removal", and thereby attempts to portray as non-meritorious Respondents' remand motions. In fact, however, it is the PLC/Ilford/IPC group[1] which has steadfastly sought to prevent the proper exercise of state court jurisdiction in this matter. The Ilford removal, which bought PLC the time necessary to sell the Ilford stock before a turnover could be effected, was *itself* improper. The propriety of IPC's removal at the instant stage of the turnover proceeding is, of course, the subject of this appeal.

[1] The Court will note that, despite the facts that neither IPC nor its property are at risk in the turnover proceeding and that IPC has additionally been fully indemnified by PLC's parent, Ciba-Geigy, for any possible loss incurred as a result of the turnover proceeding (Appendix "A", p. 3a), IPC vigorously assails not only the instant turnover proceeding, but also Respondents' prior attempts to collect their Judgment from Ciba-Geigy and Ilford (Petition, at pp. 2, 3).

IPC further incorrectly represents (Petition, p. 3), that Respondents' October 26, 1988 turnover proceeding seeking recovery of the Ilford shares was merely a "stratagem to defeat federal jurisdiction" culminating in the "voluntary [dismissal of] the action against Ilford Photo" on August 29, 1990, *id.* In fact however, Ilford's improper removal was itself *demonstrated* to be but a "stratagem" to defeat state jurisdiction – a stratagem which, while a legal failure, was a tactical success in the sense that it gave PLC time to sell the Ilford Photo stock before a turnover thereof could be effected. Appendix A, at p. 3a.

Yet again, IPC incorrectly represents that the Respondents have now brought a *"fraudulent conveyance action against IPC"*, when in fact the turnover proceeding to which IPC now finds itself a party is not brought *"against* IPC." *See, post,* at pp. 9-11. By misrepresenting the nature of the relief sought by Respondents, Petitioner has contrived to make it appear that "Respondents have sought to divest the federal courts of removal jurisdiction [over] a *new claim* . . . *against* a new party, IPC . . . ", when in fact the only relief sought in the turnover proceeding is against PLC and property (the Ilford shares) of which it retains equitable ownership by having fraudulently attempted to transfer same to IPC with full knowledge of the Respondents' rights thereto. *See,* Appendix A, p. 3a.

B. Proceedings Below

On August 29, 1990, Respondents amended their Application for Turnover Relief, naming IPC as a party-defendant and seeking to have the transfer to IPC

declared void. As in their Original Application, Respondents sought to have the Ilford stock turned over to them in satisfaction of their judgment against PLC. Appendix A, p. 4a. Significantly, they did *not* seek to hold IPC liable to satisfy their judgment against PLC.

Petitioner nevertheless again incorrectly represents (Petition, p. 3 "Proceedings Below") that Respondents "filed a fraudulent conveyance action *seeking relief against IPC,*" when in fact neither IPC nor its property are at risk, the only relief sought being against PLC and *its* property (the Ilford shares), and only then if same is *proved* to be the property of PLC. *See post,* at pp. 8, 9.

Yet again, in representing that it "timely removed this *action* on September 21, 1990" Petition at 3, 4, Petitioner mischaracterizes as uncontested "facts" both the proposition that its removal was "timely" (when that is the precise, and undetermined, issue before the Court), and that *what* it removed was a new and independent "action" rather than an ancillary post-judgment proceeding.

In remanding this matter to the federal district court, the Fifth Circuit held that 28 U.S.C. § 1446(b)'s one-year removal bar applied to prevent a removal of this case *unless* the Respondents have stated a new and independent civil action against the Petitioner in their Amended Application for Turnover Relief, which would render the one-year bar inapplicable.

That question, in turn, depends upon whether the Texas Turnover Statute *encompasses* the precise relief sought in the Amended Application (a determination of whether property in the hands of the Petitioner actually

belongs to PLC, and is therefore subject to execution) – not whether the Texas courts have "classified" or "characterized" the proceeding as ancillary or independent. The Fifth Circuit held that if the Texas Turnover Statute *does* encompass such relief, then the instant proceeding cannot be classified as a new and independent civil action under the established *federal* definition of that term, but is instead a mere continuation of the 1983 lawsuit against PLC.

It was within *this* context that the Fifth Circuit held that the district court must determine whether a Plaintiff may seek, as a part of his application for turnover relief, to prove that property in the hands of a third-party was fraudulently conveyed and therefore actually belongs to the Judgment-Debtor. If the Texas Turnover Statute is found to comprehend such a determination, then, the court held, the Respondents' Amended Application is but a mere continuation of the action filed in 1983, and not a new and independent "civil action" within the meaning of § 1441. *See*, Appendix A, at pp. 7a, 8a. The court did *not* hold that the terms "civil action" or "new and independent action" may be defined by reference to state characterizations of the Texas Turnover Statute, or that the State of Texas is competent to classify the relief embraced by its turnover statute as either "independent" or "ancillary"; rather, it held that the question of classification itself depends upon the nature of the relief afforded by the statute. Said the court: "If the district court determines that the Grassis can allege that International Paper is a fraudulent transferee *as part of their claim for turnover relief*, then the Amended Application *is an extension* of the 1983 suit and the district court must

remand this case to state court under the one-year rule of § 1446(b)." Appendix A, at p. 8a.

Finally, Petitioner is incorrect in stating that the Fifth Circuit's decision "contravened earlier rulings of the Fifth Circuit and [this court] . . . " As will be shown in more detail, *post*, the Fifth Circuit's holdings are completely consistent with all relevant prior decisions. Accordingly, the Fifth Circuit correctly denied Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc.

ARGUMENT

[A] QUESTION PRESENTED FOR REVIEW. (Petition, pp. i, 5)

Petitioner has misstated the question for review to be whether a court may "decide whether a proceeding is an independent and removable 'civil action' under 28 U.S.C. § 1441 by referring to state, rather than federal law", (Petition, at pp. i, 5), when in fact, the only question presented here is whether courts are to be prohibited from referring to state laws for the purpose of determining whether the remedies provided therein constitute independent "civil actions" within the accepted federal definition of that term.

[B] RESPONSE TO THE REASONS ASSERTED BY PETITIONER FOR THE GRANTING OF A WRIT. (Petition, pp. 6-16).

[1] The Fifth Circuit's Holding is Consistent With the Holdings of This Court.

In holding that a federal district court may look to state law to determine whether a particular remedy exists

for the purpose of classifying a proceeding as either independent or ancillary, the Fifth Circuit did *not* deviate from the principal that *federal* law controls the process of classification. Indeed, it is precisely because the scope of relief provided by a state statute is *determinative* of its characterization under established federal standards that federal courts can and do routinely look to the state laws to determine what they encompass.

The case of *Action Auto Stores, Inc. v. United Insurance Company*, No. 5:91-CV-32, available on Westlaw as 1992 WL 21203 (W.D. Mich. 1992), relied upon by Petitioner (Petition, at p. 10), is a case in point. In *Action Auto*, the court looked to the *actual* remedy provided, and found that "despite the *label* placed upon the action, the proceedings are *treated* in many ways as *separate civil actions*". Appendix E, at 4. Were the court to have been prohibited from referring to the laws of Michigan to determine the nature of the remedies *actually* embraced by the Rules in question, as Petitioner demands, it would have had no basis upon which to arrive at a *correct* characterization of the garnishment proceeding in question. Only by referring to the *actual* nature of the garnishment remedy provided could the court arrive at an *accurate* characterization of same under a uniform federal standard.

It is for this reason that in deciding the removability of post-judgment proceedings, the courts invariably turn to the nature of the relief afforded to determine whether a proceeding brought thereunder is a new and independent "civil action", or merely a continuation of the underlying lawsuit, the determining factor most often being whether or not the proceeding involves "litigating the existence of a *new liability*", *Butler v. Polk*, 592 F.2d 1293, 1295 (5th Cir.

1979).[2] It would stretch credulity to assert that a court could successfully determine whether such a proceeding was "independent" or "ancillary" *without* first determining the nature of the relief afforded by the statute or rule in question.

In the instant case, the Respondents have sought relief which is, by its very nature, ancillary rather than independent. Unlike those instances wherein judgment creditors seek to make garnishees liable for their judgments, the Respondents here have *not* sought to impose

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[2] See, *Adrianenssens v. Allstate Ins. Co.*, 258 F.2d 888, 890: "[t]he issue between the parties was whether the *insurer was liable under its policy*"; *London v. Lancashire Indem. Co. v. Courtney*, 106 F.2d 277, 283 (10th Cir. 1939): "any process . . . which when served upon [the defendant insurance company] as garnishee would have the effect to *authorize an order or judgment in personam against him* . . . is to be regarded . . . as an independent proceeding. The Motion for Writ of Garnishment *under such condition* . . . is in effect an independent and original action . . . "; *Bridges v. Bentley*, 716 F.Supp. 1389, 1392 (D. Kansas 1989): "The garnishment action is a suit involving a new party *litigating the existence of a new liability* [because] [t]he garnishment petition is couched in terms of *individual liability* on the part of Farmer's Casualty Company Mutual"; *Stewart v. EGNEP (PTY) Ltd.*, 581 F.Supp. 788, 790 (C.D. Illinois 1983): "Even though [the garnishee] submitted itself to the state court's jurisdiction, it is *now* faced with a substantially *new* and *different* cause of action, . . . For the *first* time, [the garnishee] is faced with $56,000,000 *of personal liability*, instead *of an order to turn over one of its depositor's assets.*" In *Randolph v. Employer's Mutual Liability Ins. Co. of Wisconsin*, 260 F.2d 461 (8th Cir. 1958) relief upon by Petitioner, the court held that "the only issue [in a garnishment action against a defendant's insurance carrier] is the *liability of the garnishee on its insurance contract* . . . ".

any personal liability upon IPC or to place IPC's property at risk. (The only property sought herein are the shares of Ilford, and only then if they are found to be the property of PLC).

Significantly, the courts have been invariably careful to *distinguish* actions instituted for the purpose of imposing liabilities upon new parties from proceedings such as the instant one which are instituted for the sole purpose of identifying and seizing property *of the judgment debtor* which may be found in the *hands* of third parties. This distinction has been repeatedly recognized and emphasized by both federal *and* state courts in the context of fraudulent transfer, turnover and garnishment proceedings. *See e.g., American National Bank of Austin v. Mortgageamerica Corp.*, 714 F.2d 1266, 1272, 1273, 1275 (5th Cir. 1983), and *Bado Equipment v. Bethlehem Steel*, 814 S.W.2d 464, 474 (Tex.App. – Houston [14th Dist.] 1991, no writ) (construing the Fraudulent Transfer Act), *Schultz v. Fifth Judicial District Court of Appeals at Dallas*, 810 S.W.2d 740 (Tex. 1991), *Beaumont Bank, N.A. v. Buller*, 806 S.W.2d 223, 227 (Tex. 1991), *Norsul Oil & Mining Ltd. v. Commercial Equipment Leasing Co.*, 703 S.W.2d 345, 349 (Tex.App. – San Antonio 1985, no writ), and *Childre v. Great Southwest Life Insurance Co.*, 700 S.W.2d 284, 288 (Tex.App. – Dallas 1985, no writ) (construing the Turnover Statute), and *Stewart v. EGNED Ltd., supra*, wherein the court distinguished between situations in which garnishees are mere stakeholders and those in which they are sought to be made personally liable for the indebtedness of the judgment debtor.

In *American National Bank of Austin v. Montgageamerica, supra*, for example the Fifth Circuit correctly

identified the process of recovering property pursuant to the Fraudulent Transfer Act as follows:

> [T]he remedy afforded a successful claimant [in a fraudulent transfer action] relates entirely to the debtor's fraudulently transferred property and *entails no personal liability on the part of those responsible for the transfer, see, e.g., Cantwell v. Wilson,* 241 S.W.2d 366 (Tex.Civ.App. – Austin 1951, no writ) (construing predecessor statute). A suite under the Texas [Fraudulent Transfers] Act, in other words, pursues the *debtor's* property. . . .
>
> The basic principle of a fraudulent transfers act, . . . is that '[a]s to the creditors, *the property continues in the debtor,* and it or its proceeds are liable to the creditor's demands.' *Hallack v. Hawkins,* 409 F.2d 627, 630 (6th Cir. 1969) (construing the Uniform Fraudulent Conveyance Act). at pp. 1271, 1273.

Later in the same opinion, the Fifth Circuit again identified the process as:

> [e]ssentially [an attempt to recover] property which *properly belongs to the debtor* and which the debtor has fraudulently transferred in an effort to put it out of the reach of creditors . . . the transferee may have colorable title to the property, but the equitable interest at least as far as the creditors (but not the debtor) are concerned – is considered to *remain in the debtor* so that creditors may . . . execute judgment upon it *as though the debtor* had never transferred it. (Emphasis supplied), at p. 1275.

In *Bado Equipment v. Bethlehem Steel, supra,* the court put it more succinctly, to wit: *"[A] cause of action* [brought

pursuant to the Fraudulent Transfer Act] *is against the party making the transfer, not against the party accepting the transfer*", *Id.*, at 474.

The Texas Turnover Statute likewise exists only to better permit the assets of *judgment debtors* to be reached, it is *not* used as a vehicle to impose liability upon third parties, *viz:* "[T]exas courts *do not apply the turnover statute to [i.e.,* do not impose personal liability upon] *non-judgment debtors*", *Beaumont Bank, N.A. v. Buller, supra,* at 227.

Nevertheless, the Turnover Statute can and does serve as a vehicle to identify and recover the property of a *judgment debtor* which is in the *hands* of third parties. *Schultz, supra,* at 740, *Norsul Oil & Mining Ltd., supra,* at 349, *Childre, supra,* at 288, *First City National Bank of Beaumont v. Phelan,* 718 S.W.2d 402 (Tex.App. – Beaumont 1986, writ ref'd n.r.e.).

Despite this settled law, IPC argued in the courts below that the question of whether the Ilford stock belongs to PLC is *not* one which can be raised in a turnover proceeding. Pretermitting that question, the Fifth Circuit merely held that *if* the Turnover Statute properly comprehends a determination of that issue, then the relief sought by Respondents herein is clearly ancillary, and not independent. Appendix A, p. 8a. Such holding manifestly does not conflict with prior decisions of this Court.

For example, this Court's holding in *Grubbs v. General Electric Credit Corporation,* 405 U.S. 697, 705 (1972) that state laws may not pre-empt federal criteria for determining removal jurisdiction is in no manner contravened by

the Fifth Circuit's holding herein that state law may be referred to for the purpose of determining whether the federal criteria have been *met*.

Similarly, this Honorable Court's holdings in *Shamrock Oil and Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941), *Chicago R.I. and P.R. Co. v. Stude*, 346 U.S. 574, 580 (1954), and *Road District v. St. Louis S.W. Ry. Co.*, 257 U.S. 547, 551 (1922), that state laws cannot pre-empt federal characterizations which are determinative of federal jurisdiction, are not contravened by the Fifth Circuit's holding herein that state laws *may* be looked to for the purpose of determining whether the federal characterizations are applicable in each of the disparate circumstances under which their application is sought.

The uniformity of a standard is not jeopardized by the process of identifying the variegated circumstances under which its application may be sought. The Fifth Circuit in the instant case did not hold that state characterizations may be relied upon to determine whether a proceeding is "ancillary" or "independent", but rather that the nature of the state remedies afforded the Respondents must be looked to in determining whether established *federal* criteria have been met. Such a holding manifestly does not contravene the prior holdings of this Court.

[2] The Fifth Circuit's Holding is Consistent With the Holdings of the Second, Fourth, Eighth, and Ninth Circuits.

Just as it did not contravene the holdings of this Honorable Court, the Fifth Circuit's holding in the instant

case does not conflict with the holdings of the various Circuit Courts of Appeals. The Fifth Circuit herein did not hold that the law of Texas could "supersede the privilege of removal granted by a federal statute", *Yonkers Racing Corp. v. City of Yonkers*, 858 F.2d 855, 862 (2d Cir. 1988), or that the construction of the removal statutes is *not* "purely a matter of federal law", *Able v. Upjohn Co., Inc.*, 829 F.2d 1330, 1333 n.2 (4th Cir. 1987), or that courts need not "look to federal criteria", *Randolph v. Employer's Mutual Liability Ins. Co. of Wisconsin, supra*, at 463, or that "the *classification* which [state] courts give [post-judgment] proceedings" is somehow binding upon federal Courts, *Randolph*, 265 F.2d at 464, or that federal law should not be looked to to determine whether the "elements of removal jurisdiction have been established under the statutes", *McCarthy Western Constructors, Inc. v. Phoenix Resort Corp.*, 951 F.2d 1137, 1140 (9th Cir. 1991).

Rather, the Fifth Circuit held that the district court must ascertain the extent of the relief afforded by the Texas Turnover Statute and, if it embraces the determination sought by Respondents, remand the turnover proceeding as one which is ancillary to the underlying (non-removable) claim.

[3] The Fifth Circuit's Holding Did Not Conflict With Prior Fifth Circuit Precedent.

The distinction between accepting a characterization and making an independent determination has, of course, been consistently recognized and applied by the Fifth Circuit. In *Butler v. Polk*, 592 F.2d 1293 (5th Cir. 1979), for example, the Fifth Circuit recognized that while "the

proper *characterization* [of a post-judgment garnishment proceeding] under §1441 is essentially a matter of federal law . . . ", the cases which construe garnishment actions "reflect the recognition that [such actions] are in effect suits involving a new party *litigating the existence of a new liability*", *Id.*, at 1296. The court thus acknowledged the necessity of referring to *federal* criteria *and* to the *nature* of the *state remedy* in arriving at a proper characterization thereof. It further recognized the distinction which exists between independent actions which seek to impose *new liabilities* and ancillary proceedings which do not. *Id.*, at 1296. In *Jones v. Roadway Exp., Inc.*, 931 F.2d 1086, 1092 (5th Cir. 1991), the Fifth Circuit again turned to state law (Title 130 of the Revised Civil Statutes of Texas, including art. 8307c) to determine whether it was the intent of the Texas Legislature that art. 8307c remain an integral part of the Texas Workers' Compensation scheme, even while applying the applicable federal criteria in making the appropriate classification. *Id.*, at 1092.

Yet again, in *Brown v. Demco, Inc.*, 792 F.2d 478 (5th Cir. 1986), the court merely applied the rule laid down by this Court in *Shamrock, supra*, that the removal statute is "unaffected by local law *definition or characterization* of the subject matter to which it is to be applied . . . "; it did *not* destroy the very process by which such characterizations are made by holding that a court may not refer to state law for the purpose of determining the nature of the remedy afforded thereby. *Id.*, at 480. Yet again, in neither *Paxton v. Weaver*, 553 F.2d 936 (5th Cir. 1977) nor *Central of Georgia Ry. Co. v. Riegel Textile Corp.*, 426 F.2d 935 (5th Cir. 1970) did the Fifth Circuit construe this Court's holding in cases such as *Grubbs, supra*, and *Shamrock, supra* in the

manner advocated by Petitioner. Indeed, in *Paxton*, the court once again *referred* to the remedies afforded by the law of Mississippi in arriving at its own characterization. *Paxton, supra,* at 939, fn.2. "We only need to decide whether, under a liberal review of *Mississippi law* or what it might be, arguable grounds exist for a recovery under appellants' theories."

There thus exists no "irreconcilable conflict" between the Fifth Circuit's prior holdings and its holding in the instant case. On the contrary, its holding herein is entirely consistent with all such prior decisions.

Petitioner's contention that "Congress could not and did not intend that the right of removal should depend upon *state law*", Petition, at p. 10, is thus simply not true in the sense intended by Petitioner. References to state laws and the remedies provided therein are in may cases absolutely essential to a proper application of the federal removal standards.[3]

Because the Fifth Circuit's holding in the instant case did not contravene, but was fully consistent with, all relevant prior decisions, the Fifth Circuit correctly denied Petitioner's Petition for Rehearing and Suggestion for

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[3] Petitioner's attempts to create conflicts between state court interpretations of the Texas Turnover Statute and that statute's proper "characterization" under appropriate federal criteria are, to paraphrase Petitioner "flawed both in their reasoning and in their result". Petition, at p. 10. The proposition that a party's removal "rights" would be *lost* by a "broad" construction of the removal statute to embrace the relief requested by Respondents is totally irrelevant to the issue of whether such a remedy, if it exists, provides for "independent" or "ancillary" relief under the appropriate federal standards.

Rehearing En Banc, and its Petition herein should also be, in all things, denied.

CONCLUSION

Wherefore, Respondents respectfully pray that the request of Petitioner that a Writ of Certiorari issue herein be in all things denied.

Respectfully submitted,

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